IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1064

WILLIAM A. WATERS AND DONALD SAMUELS,
Petitioners,

v.

WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY AND UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MEMORANDUM IN OPPOSITION OF UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21

The Brief in Opposition of respondent International Harvester Company (Wisconsin Steel Works) deals with the petition for certiorari (hereafter "Pet.") in painstaking detail. Nevertheless, we think it appropriate to emphasize briefly the decisive points, a) that petitioners' strained effort to assimilate this case to *Franks* v. *Bowman Transportation Co.,* No. 74-728

must fail, and b) that the Questions Presented simply do not arise on this record.[1]

A. WISCONSIN STEEL DID NOT REFUSE TO HIRE EITHER PETITIONER BECAUSE OF HIS RACE: THE FRANKS CASE IS NOT THIS CASE.

Petitioners assert that "[p]laintiff Waters was rejected for employment by Wisconsin Steel because of his race in 1957" (Pet. 11, n. 11). The documentary evidence shows this statement to be false: No bricklayer, white or black, was hired at Wisconsin Steel from January 14, 1957 to February 9, 1959.[2] Petitioners cite no contrary evidence.[3] As to Samuels, the matter is equally simple. He applied for a job in writing and the Company did not even know whether he was black or white. Therefore, it could not have discriminated against him on the basis of his race.

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[1] In laying the foundation for their argument, petitioners set forth four purported "rulings" by the Court of Appeals (Pet. 7, quoting nothing and citing "Pet. 1a-20a", that is, the entire opinion). Three of these (Nos. 1, 2 and 4) relate to questions which are purportedly presented (Nos. 2, 1 and 3 respectively). As we shall develop in the body of our argument, pp. 5-9 *infra*, rulings "(1)", "(2)" and "(4)"were not made, and the related "Questions Presented" are not in this case.

[2] Plaintiffs' (petitioners') exhibit No. 3. (We are lodging the record below with the Clerk of this Court.) Waters applied "during the fall of 1957" (Pet. 12).

[3] Likewise incorrect are petitioners' assertions (Pet. 5, 11-12, citing nothing) that they had alleged in their complaint, and that the District Court had found as a fact, that Waters was initially denied employment because of his race. The complaint (J.A. 1-9) does not even allege that Waters had applied for a job before 1964; its earliest reference to him is that he was hired in that year. (J.A. 3). And the finding attributed to the District Court is likewise nonexistent (See Pet. 24a-27a). Nor, of course, did the Court of Appeals so find.

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Thus, petitioners ask this Court to accept as a fact a proposition which was not found by either court below, where the failure to so find is not alleged as error in the Questions Presented, and where the only evidence refutes the petitioners' assertion.

On the real facts, this case differs wholly from *Franks* v. *Bowman Transportation Co.*, No. 74-728, cert. granted March 24, 1975, 43 U.S.L.Wk. 3515 (hereafter "*Franks*"), where, in supporting the petition for certiorari, the United States and the EEOC correctly stated the issue to be "whether a district court, in fashioning a remedy for discriminatory refusals to hire, is precluded from granting seniority credit to qualified persons who were illegally denied employment because of their race."[4] Petitioners in *Franks* likewise described the issue in that case to be whether § 703(h) "precludes a grant of retroactive seniority to discriminatorily rejected job applicants" but erroneously described *Waters* as having decided that issue:

> "At the time the petition was filed, two circuits had ruled on the issue presented by the petition. *Franks* v. *Bowman Transportation Company*, 495 F.2d 398 (5th Cir. 1974); *Waters* v. *Wisconsin Steel Works of Int'l Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974).[1] Both Circuits held that Section 703(h), 42 U.S.C. § 2000e-2(h), precludes a grant of retroactive seniority to discriminatorily rejected job applicants. On January 25, 1975, the Sixth Circuit adopted a squarely contrary view in *Meadows* v. *Ford Motor Co., et al.*, — F.2d —, 9 EPD ¶ 9907.

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[1] Plaintiff Waters filed a Petition for a Writ of Certiorari on this and other issues on February 24, 1975, No. 74-1064."[5]

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[4] Memorandum for United States and Equal Employment Opportunity Commission, No. 74-728, p. 3.

[5] Supplemental Memorandum in Support of Petition for a Writ of Certiorari, No. 74-728, p. 1.

Some of the counsel for petitioners in *Franks* also represent petitioners here in *Waters*. Thus, the references to the Court of Appeals' decision in *Waters* and to the petition for certiorari which they had filed herein appear designed to generate momentum for the petition in *Waters* by assimilating it to *Franks*.[6] This tactic must fail, however, because the Seventh Circuit in *Waters*, having no "discriminatorily rejected job applicants" before it, had no occasion to rule, as did the Fifth Circuit in *Franks*, on the seniority or other rights of such persons.

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[6] The timing of their reference to *Waters* is instructive. The petition for certiorari in *Franks* (filed December 10, 1974) did not advert to the Seventh Circuit's decision in *Waters* of August 26, 1974 (rehearing denied November 26, 1974). (If *Waters* had decided the same issue as *Franks* in accord with the *Franks* decision, it would have been the better part of candor, to say the least, for Franks' counsel to advise this Court that there was a new Seventh Circuit decision in accord with the Fifth Circuit decision which they were seeking to have reviewed. But since the Seventh Circuit in *Waters* had *not* decided the *Franks* issue, counsel in *Franks* were entirely justified in not mentioning it.) In the interim the United States and the EEOC as well as the respondent union had agreed that certiorari should be granted in *Franks* by respective submissions of February 6 and February 26, 1974. Additionally, *Meadows* had been decided on January 24, creating a true conflict with *Franks*. Thus, on March 5, 1975 when the petitioners in *Franks* filed their supplemental memorandum, it was almost certain that certiorari would be granted in *Franks* and that the attempt could safely be made to use that case as a vehicle for obtaining certiorari in *Waters*. If it could be made to appear that the Seventh Circuit in *Waters* had decided the same issue that the Fifth Circuit had decided in *Franks*, the grant of certiorari in *Waters* would be almost inevitable.

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B. THE QUESTIONS PRESENTED BY THE PETITION HEREIN DO NOT ARISE ON THIS RECORD.

1. In a further effort to reach out for the coattails of *Franks*, petitioners refer to the petition in that case in an asterisked footnote to the second of their Questions Presented, which reads as follows:

> "2. Does section 703(h) preclude the district courts in Title VII actions from providing a remedy for a seniority system which perpetuates the effects of past discrimination and has a discriminatory impact on black employees and job applicants?" (Pet. 2)

In their argument relating to this question, petitioners assert:

> "The Court of Appeals did not deny that the company had discriminated in the past or that the seniority system had the effect of continuing the discriminatory impact of that prior misconduct." (Pet. 15)

Petitioners are wrong; the Court of Appeals *did* so "deny," not once, but twice. Thus, at Pet. 12a the Court said:

> "We are of the view that Wisconsin Steel's employment seniority system embodying the 'last hired, first fired' principle of seniority is not of itself racially discriminatory or does it have the effect of perpetuating prior racial discrimination in violation of the strictures of Title VII."

Again, at Pet. 16a, the Court said:

> "On balance, we think Wisconsin Steel's seniority system is racially neutral and does not perpetuate the discrimination of the past."

Petitioners do not challenge that determination in their Questions Presented; instead, they hope that this Court will disregard it. Thus, while the effect of § 703(h) on seniority systems which "perpetuates the effects of past discrimination and has a discriminatory impact on black employees and job applicants", is involved in *Franks,* it does not arise in the petition of *Waters et al.*

2. Further, once it is understood that there was no finding that Waters was illegally denied employment and that the seniority system did not perpetuate past discrimination, it becomes clear that petitioners' first Question Presented does not arise either. That Question reads:

> "1. Do the limitations of section 703(h) of Title VII of the Civil Rights Act of 1964, apply to or restrict the remedies available under 42 U.S.C. § 1981?" (Pet. 2)

But while petitioners here and in the course of their argument strive desperately to formulate the issue in terms of "remedies" (Pet. 7, 9, 12-15, 23-24) and thereby to predicate an argument on *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, the legality of Waters' layoff in 1964 and the rejection of Samuels' job application do not involve an issue of remedy at all, because no underlying violation of Waters' or Samuels' rights calling for *any* remedy had been established.[7] That

[7] As to Waters, the contention that he would not have been laid off in 1964 is based on the false assertion that he had been unlawfully denied a job in 1957 (Pet. 11-12). And as to Samuels, the argument depends not only on the rejected claim that the seniority system perpetuated past discrimination, but additionally on the claim that it perpetuated past discrimination "as to" him (Pet. 12). Since he was a new applicant, there was discrimination

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issue, which the Court of Appeals decided against petitioners, is not one of remedy but one of substantive liability appears even from petitioners' truncated quotation from the opinion (Pet. 16a, n. 4, quoted at Pet. 13.) And while the Seventh Circuit's discussion of substantive liability under 42 U.S.C. § 1981 was not as elaborate as petitioners would have preferred (Pet. 13), none of their Questions Presented challenges the Court's holding that 42 U.S.C. § 1981 does not forbid the use of a "seniority system [which] is racially neutral and does not perpetuate the discrimination of the past" (Pet. 16a, text and note at n. 4).[8] That holding is obviously correct, and is in nowise inconsistent with *Alexander* v. *Gardner-Denver* (of which the Court was fully cognizant, Pet. 9a) or any other appellate decision cited at Pet. 13-15.[9]

"as to" Samuels only if *no* preference for former employees was legal. In order to convey the impression that the seniority system was not racially neutral petitioners assert that "the former employees hired instead [of Samuels] were * * * all white" (Pet. 12). But in fact, at least five bricklayers offered recall under the Company's policy were black, and Waters was one of them (Pl. Ex. 2 & 3). Indeed, the position that any preference for former employees is illegal conflicts with Waters' claim, sustained by the court below, that he was entitled to a statutory preference as a former employee over employees with longer service who had accepted severance pay (Pet. 16a-17a).

[8] Rather, as we have seen, petitioners assert that the seniority system was found to perpetuate past discrimination, and that the Court of Appeals conceded that the only reason that relief under § 1981 was denied was that it had been repealed by Title VII of the 1964 Act. See Pet. 12, discussed at pp. 5-6 *supra*.

[9] The distinction between the remedial and substantive issue, that is, between the questions which petitioners assert was decided below and the question which actually was decided, appears with special clarity in *Long* v. *Ford Motor Co.*, 496 F.2d 500 (C.A. 6).

(Cont. on next page)

3. Finally, petitioners' Question 3, which is reproduced in the margin,[10] also does not arise on this record. The job offer to Waters was not "conditioned on a waiver by the employee of some or all of his remedies for past discrimination" (Pet. 2). Neither the District Court nor the Court of Appeals found that Wisconsin Steel had insisted that Waters execute a waiver abandoning any statutory right as asserted at Pet. 7, 27, 29.[11] And petitioners neither cite any thing in the record to support the assertion that the Company sought to compel a waiver of Waters' statutory rights, nor quote the language of the document which purportedly sought to exact such a waiver; the record refutes the claim.[12] Thus, it is entirely unjust

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There are two parts to the Court's opinion in *Long:* In the first part the Court held, following *Alexander, supra*, that "the availability of § 1981 is not limited by the existence of remedies under Title VII" (*id.* at 504). (That, of course, is the proposition which petitioners say was decided against them by the Seventh Circuit herein, but which that Court actually did not reach.) The second part of the Court's opinion in *Long* dealt with the "merits" and discussed at some length the showing which a plaintiff must make in order to establish a violation of § 1981 (*id.* at 504-06). (That is the issue which petitioners do not discuss, but which *was* decided against them by the Seventh Circuit.)

[10] "3. Is an aggrieved employee's right to additional back pay cut off when he declines to accept a job offer from the defendant employer, where (a) the job offered is less desirable than the job to which he is entitled, (b) the job offered is less desirable than the job he then holds, and (c) the offer is conditioned on a waiver by the employee of some or all of his remedies for past discrimination?" (Pet. 2).

[11] At Pet. 27, petitioners again inject their unfounded contention that Waters was originally denied employment because of his race. It is noteworthy that Waters himself did not so assert in his self-serving letter to the Company, quoted at Pet. 27-28, n. 39.

[12] While their Petition for Certiorari is conveniently vague, petitioners' brief in the Court of Appeals (p. 16) based the waiver argument on Wisconsin Steel's requirement that a reinstated employee "sign a document stating that any time accumulated while a probationary employee would not be applied toward his seni-

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for petitioners to charge that "the Seventh Circuit on the facts of this case sanctioned a deliberate and callous attempt by Wisconsin Steel to sabotage Waters' pending claim by forcing him to choose between waiving his claim for seniority and back pay (if he accepted the job) and waiving any future back pay (if he did not)." (Pet. 29) On this record, the real issue is whether Wisconsin Steel could be forced to choose between giving Waters everything to which he believed himself entitled and thereby losing its right to defend against his claim (if it accepted Waters' conditions), or permitting additional back pay liability to accrue (if it rejected Waters' conditions). Petitioners' misstatement of what the court below ruled evidences their awareness that a candid contention that the law imposes this dilemma on any party would be too plainly lacking in merit to warrant this Court's attention.

CONCLUSION

For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

LESTER ASHER
MARVIN GITTLER
228 North LaSalle Street
Chicago, Illinois 60601

GEORGE KAUFMANN
1735 New York Avenue, N.W.
Washington, D. C. 20006

Attorneys for Respondent United Order of American Bricklayers and Stone Masons, Local 21

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ority". Waters had signed such a document when he was reinstated in March, 1957, and he admitted that under the collective bargaining agreement probationary employees do not accrue seniority (Tr. 37). Even in his letter to the Company (Pet. 27-28, n. 39) petitioner never expressed the fear that by signing this standard form he would waive his statutory rights.